UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSHUA BLANCHARD,

Plaintiff,

v.

EXECUTIVE OFFICE FOR THE UNITED STATES ATTORNEYS,

Defendant.
_____/

CASE NO. 1:22-cv-00539

HON. Robert J. Jonker
U.S. District Court Judge

HON. Phillip J. Green
U.S. Magistrate Judge

DEFENDANT'S ANSWER

Defendant the Executive Office of the United States Attorneys answers as follows:

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., for declaratory, injunctive, and other appropriate relief, and seeking the expedited processing and release of agency records requested by Plaintiff, Joshua Blanchard, from the Executive Office for United States Attorneys ("EOUSA").

Answer: The allegations in paragraph 1 of the complaint constitute Plaintiff's characterization of this action, to which no response is required. To the extent a response is deemed required, Defendant admits only that Plaintiff brings this action under FOIA and that Plaintiff seeks the processing and release of agency records. Defendant denies all remaining allegations.

2. Plaintiff brings this action to compel Defendant to make available for public inspection and copying a recusal memorandum submitted by United States Attorney Mark Totten relating to his recusal from the prosecution of the defendants in *United States v Fox, et al,* 20-cr-

183-RJJ as well as any document appointing counsel other than Mr. Totten, pursuant to 28 USC §515, to prosecute the defendants.

Answer: This paragraph contains Plaintiff's request for relief, to which no response is required.

PARTIES

3. Plaintiff is a resident of the Western District of Michigan.

Answer: Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

4. Defendant EOUSA, headquartered at 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530, is a component of DOJ and an agency of the federal government within the meaning of 5 U.S.C. § 551 and 5 U.S.C. § 552(f) that has possession, custody, and/or control of records that Plaintiff seeks.

Answer: Admitted only that DOJ is an agency of the United States, that it is headquartered in Washington, D.C., and that EOUSA is a component of DOJ. The remaining allegations in paragraph 4 consist of Plaintiff's legal conclusions, to which no response is required.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action and personal jurisdiction over Defendants pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

Answer: Paragraph 5 states a legal conclusion regarding subject matter jurisdiction and personal jurisdiction to which no response is required.

6. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Answer: Paragraph 6 states a legal conclusion regarding venue to which no response is required.

FACTS

7. Mark Totten is the current United States Attorney for the Western District of Michigan.

Answer: Admitted.

8. Mr. Totten has been recused from participation in the prosecution of the defendants in *United States v. Fox, et al.* 1:20-cr-00183-RJJ, PageID.6955.

Answer: Admitted.

9. On information and belief, the recusal was at Mr. Totten's request.

Answer: Admitted only that Mr. Totten appropriately notified Defendant of circumstances that might necessitate his recusal and complied with Defendant's coordination of the recusal action. Defendant denies any remaining allegations in this paragraph.

10. On information and belief, a memorandum exists detailing Mr. Totten's request to be recused because DOJ policy required Mr. Totten to draft such a memorandum to request his recusal. *See* USAM §3-2.170 (requiring the US Attorney to submit a written recusal request memorandum when recusal is required).

Answer: Denied that DOJ policy required Mr. Totten to draft a memorandum to request his recusal; by way of further information, Defendant respectfully refers the Court to the U.S. Attorneys' Manual, which speaks for itself. Admitted only that documentation exists regarding Mr. Totten's recusal. Defendant denies any remaining allegations in paragraph 10.

11. On information and belief, some document exists which appoints Mr. Daniels, Mr. O'Connor, and Mr. Kessler to continue the prosecution of the defendants in *United States v. Fox. See* 28 USC §515 (requiring specific direction from the Attorney General to authorize a special appointment to conduct criminal proceedings).

Answer: Denied. By way of further information, Defendant states that the First Assistant United States Attorney for the Western District of Michigan previously was authorized to perform the functions of a United States Attorney with respect to *United States v Fox, et al,* 20-cr-183-RJJ; at that time, Mr. Daniels was the First Assistant United States Attorney for the Western District of Michigan. As of the time of this filing, the Appellate Chief for the Western District of Michigan is so authorized.

12. On May 10, 2022, Plaintiff filed a request pursuant to FOIA ("FOIA Request") with the EOUSA requesting a copy of

> "Any letter, memorandum, correspondence, or other writing requesting that special counsel be appointed to prosecuted crimes within the Western District of Michigan or explaining the basis for United States Attorney Mark Totten's recusal from any case, including, United States v Fox et al.
>
> Any appointment letters or other documents which grant authority to Donald Daniels, Nils Kessler, or Christopher O'Connor to conduct criminal prosecutions in the Western District of Michigan pursuant to 28 USC §515. (Date Range for Record Search: From 04/01/2022 To 05/10/2022)"

Answer: Defendant admits only that Plaintiff submitted a FOIA request on May 10, 2022. Defendant respectfully refers the Court to this request for a complete and accurate statement of its contents and denies any allegations inconsistent with it.

13. As of filing, the Plaintiff's FOIA request has been pending with EOUSA for 23 working days, excepting Saturdays, Sundays, and legal holidays. *See* 5 USC §552(6)(A)(i).

Answer: Defendant admits only that it had not provided a response to Plaintiff as of the time of filing. Defendant denies any remaining allegations in paragraph 13.

14. As of filing, Defendant has not responded to Plaintiff's FOIA request as required by law.

Answer: Defendant admits only that it had not provided a response to Plaintiff as of the time of filing. The remaining allegations in paragraph 14 state a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant denies the allegations.

COUNT 1: VIOLATION OF FOIA

FOR FAILURE TO COMPLY WITH STATUTORY DEADLINES

15. Plaintiff incorporates the preceding paragraphs by reference.

Answer: Defendant incorporates the preceding paragraphs by reference.

16. Defendant is an agency subject to FOIA. 5 USC §552(f).

Answer: Paragraph 16 states a legal conclusion to which no response is required.

17. The FOIA Request properly seeks records that are in possession, custody, or control of the defendant agency.

Answer: Paragraph 17 states a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant denies the allegations of this paragraph.

18. The FOIA Request complied with all agency regulations pertaining to FOIA requests.

Answer: Paragraph 18 states a legal conclusion to which no response is required.

19. Defendant failed to make a determination regarding the FOIA Request and within the statutory deadlines as required by FOIA. 5 USC § 552(a)(6)(A).

Answer: Paragraph 19 states a legal conclusion to which no response is required.

20. The failure of Defendant to make a determination with respect to the FOIA Request within FOIA's statutory deadlines violates its obligations under FOIA. 5 U.S.C. § 552(a)(6)(A).

Answer: Paragraph 20 states a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant denies any allegations that it violated its obligations under FOIA.

21. Plaintiff is deemed to have exhausted applicable administrative remedies with respect to the FOIA Request. 5 U.S.C. § 552(a)(6)(C)(i).

Answer: Paragraph 21 states a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant denies the allegations.

COUNT 2: VIOLATION OF FOIA

FOR UNLAWFUL WITHHOLDING OF AGENCY RECORDS

22. Plaintiff incorporates the preceding paragraphs by reference.

Answer: Defendant incorporates the preceding paragraphs by reference.

23. Defendant is an agency subject to FOIA. 5 U.S.C. §§ 552(f), 551.

Answer: Paragraph 23 states a legal conclusion to which no response is required.

24. The FOIA Request properly seek records under FOIA that are within the possession, custody, and/or control of Defendant.

Answer: Paragraph 24 states a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant denies the allegations of this paragraph.

25. The FOIA Request complied with all applicable regulations regarding the submission of FOIA requests.

Answer: Paragraph 25 states a legal conclusion to which no response is required.

26. Defendant has not released any records or portions thereof in response to the FOIA Request.

Answer: Admitted.

27. Defendant has not cited any exemptions to withhold records or portions thereof that are responsive to the FOIA Request.

Answer: Admitted only that Defendant has not provided a response to Plaintiff. Defendant denies the remaining allegations of paragraph 27.

28. Defendant has not identified how disclosure of each of the records or portions thereof sought by the FOIA Request would foreseeably harm an interest protected by a FOIA exemption and/or why disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A).

Answer: Admitted only that Defendant has not provided a response to Plaintiff. Defendant denies the remaining allegations of paragraph 28.

29. Records responsive to the FOIA Request are required to be released under FOIA.

Answer: Paragraph 29 states a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant denies the allegations of this paragraph.

30. Defendant has improperly withheld agency records responsive to the FOIA Request, in violation of FOIA. 5 U.S.C. § 552(a)(3)(A).

Answer: Paragraph 30 states a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant denies the allegations.

31. Plaintiff is deemed to have exhausted applicable administrative remedies with respect to the FOIA Request. 5 U.S.C. § 552(a)(6)(C)(i).

Answer: Paragraph 31 states a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant denies the allegations.

WHEREFORE, the Plaintiff respectfully requests this Court:

A. order Defendant to conduct a search reasonably calculated to identify all records responsive to the FOIA Request;

B. enjoin Defendants from withholding all records or portions thereof responsive to the FOIA that may not be withheld under FOIA;

C. issue a declaration that Plaintiff is entitled to disclosure of the requested records;

D. issue a declaration that the failure of Defendant to provide a timely determination in response to the FOIA Request violates their obligations under FOIA;

E. award Plaintiff reasonable attorney fees and costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

F. grant such other relief as the Court may deem just and proper.

Answer: These paragraphs set forth Plaintiff's request for relief to which no response is necessary. To the extent that any portion of this paragraph is deemed to contain an allegation of fact or a response is deemed necessary, Defendant denies that Plaintiff is entitled to any relief.

AFFIRMATIVE DEFENSES

1. Plaintiff is not entitled to compel the production of records or information exempt from disclosure under FOIA. *See* 5 U.S.C. § 552(b).

2. Plaintiff is not entitled to remedies beyond what is provided for in the FOIA. *See* 5. U.S.C. § 552.

3. Plaintiff has failed to properly exhaust administrative remedies.

The United States reserves the right to amend its Answer, and to add affirmative defenses that become known through investigation and discovery.

WHEREFORE, Defendant requests that this Court enter judgment in its favor on all of Plaintiff's claims, together with all other relief this Court deems just and equitable under the circumstances.

Respectfully submitted,

ANDREW BYERLY BIRGE
Appellate Chief
Attorney for the United States, Acting under
Authority Conferred by 28 U.S.C. § 515

Dated: July 27, 2022

/s/ *Jeanne F. Long*
JEANNE F. LONG
Assistant United States Attorney
Post Office Box 208
Grand Rapids, MI 49501-0208
(616) 456-2404
Jeanne.Long@usdoj.gov